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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT EDWARD HOLDRIDGE, Defendant and Appellant.	H045640 (Santa Cruz County Super. Ct. No. F19268)

I. INTRODUCTION

Defendant Robert Edward Holdridge appeals after he was convicted by jury of driving a vehicle under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a))[1] and driving a vehicle with a blood alcohol content of 0.08 percent or more causing injury (§ 23153, subd. (b)). The jury found not true the allegation that defendant personally inflicted great bodily injury in the commission of the offenses (Pen. Code, § 12022.7, subd. (a)), and the trial court dismissed the allegation that defendant had previously been convicted of reckless driving involving the consumption of alcohol (§§ 23103, 23103.5, 23540, 23546). The trial court placed defendant on probation for five years.

[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

Defendant contends that his convictions must be reversed because "one of the prosecution's theories was based on a legally incorrect theory of guilt" and it cannot be determined whether the verdicts rested on the legally incorrect theory.[2] For reasons that we will explain, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Evidence*

1. The Incident

On May 22, 2010, Michael Wilson met some friends to go mountain biking in Santa Cruz. After the group finished their ride, they biked to a restaurant for pizza and beer. Over the course of one and a half to two hours, Wilson drank approximately two 16-ounce pints of beer. He did not feel the effects of the alcohol.

Wilson left the restaurant sometime around 2:00 or 3:00 p.m. to begin his ride home.[3] Wilson wanted to stop at a grocery store, so he began heading toward the Safeway on Morrissey Boulevard. There was a significant amount of traffic that day, but the area was well lit and dry.

At some point while traveling on Soquel Avenue, Wilson rode in between a left-hand turn lane and a lane going straight because he wanted to make a left turn onto Morrissey Boulevard. As Wilson traveled toward the Morrissey Boulevard intersection at approximately five to ten miles per hour, he heard someone "beep[] their horn loud." It was not a "regular beep"; "someone [was] laying on the horn." Wilson also heard yelling.

Wilson looked back briefly to see what was going on but could not tell who was honking. The car closest to him was a pretty good distance away, roughly 25 to 30 feet.

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[2] Defendant initially raised two additional issues on appeal, but subsequently withdrew them.

[3] Wilson testified that it was difficult to remember the exact time because the trial occurred eight years after the incident.

As Wilson turned forward to proceed through the intersection, he was hit from behind on his right side. Wilson did not hear any tires screech before he was hit, but he did hear an engine revving or accelerating. Wilson's bike flipped and he was thrown to the ground on his right side. He extended his right arm to brace for the impact.

Wilson jumped back up and got out of the road. He was angry, in pain, and in shock. His bike was lying in the middle of the street, under the bumper of the car that hit him. Wilson went over to the intersection's island and sat down. The driver who hit him, later identified as defendant, exited his car and was "yelling and screaming and throwing a fit." A woman in defendant's car was also yelling and screaming. Defendant approached Wilson in an aggressive manner, and Wilson felt threatened. Wilson used his cell phone to call 911 because he knew he was hurt. He also told defendant to get away from him. Defendant got "right up on [Wilson]" with "his hands outreached and yelling," so Wilson used his foot to push defendant away. Based on defendant's mannerisms and tone, it seemed to Wilson as if defendant had been drinking.

Wilson's bicycle was "a total loss." Its back wheel was bent from the impact and the frame was cracked. It was no longer rideable.

Wilson was treated by paramedics and taken to the hospital. His right wrist was broken, he had a contusion on his shoulder and his right latissimus dorsi, and he had road rash. His wrist was in a cast for about four weeks and he was unable to work. He still experienced pain in his wrist and shoulder.

2. Eyewitness Testimony

Gloria Simpson was a passenger in her friend's car on Soquel Avenue when she saw a man and a bicycle underneath the front of a vehicle. Her friend pulled over, and Simpson saw defendant exit the car and start aggressively yelling and fighting with the man on the ground. Defendant did not try to render aid. The cyclist was trying to defend himself. Bystanders were yelling at them and trying to break up the fight. The police arrived within a few minutes.

Christine Gaydos was going "around the Morrissey turnoff" with Simpson when she noticed a car parked in the street "and a lot of things going on." Gaydos parked and saw a lot of people "joining th[e] situation." One person seemed mad and angry and another person was putting his hands up and saying "stop." Both of those individuals were yelling, but the guy saying "stop" was in defense mode. The other people were trying to halt the fight.

Jennifer Craig was headed toward Poplar Avenue on Water Street when she heard a horn and yelling and saw a bicycle and a vehicle to her left. The car sped up after its horn honked. The bike and the car were travelling approximately 15 to 20 miles per hour and were "maybe less than a car width" apart. The car hit the bicycle and the cyclist fell off the bike. Craig turned onto Poplar Avenue and pulled over to call the police. The driver, whom Craig identified as defendant, yelled at his passenger, got out of the car, and checked on the cyclist. The driver and the cyclist began arguing, but the driver was the aggressor. Based on his actions and his slurred speech, it seemed to Craig as though the driver were under the influence.

Kevin Gonzales was walking to his car when honking drew his attention to a vehicle with a bicycle in front of it. Gonzales did not see the distance between the car and the bike, but he could tell that the car was going about two to three miles per hour. There was a long, continuous honk and then the cyclist disappeared. The car stopped. Gonzales did not hear any tires screech. People across the street started yelling, and Gonzales went over to see what was going on. The cyclist and bike were on the ground in front of the car.

3. Police Investigation

On May 22, 2010, at approximately 7:30 p.m., Santa Cruz Police Officer Abelino Vigil responded to the report of an assault with a deadly weapon. Officer Vigil found the car described in the call with a bicycle next to it. People at the scene told Officer Vigil

that the bike had fallen in "[t]he [n]umber 1 lane," which was the left-hand turn lane "closest to the left."[4]

Officer Vigil briefly spoke with Wilson, who seemed very upset. He then spoke with defendant, who was also upset. Defendant said that he was driving behind a cyclist who suddenly slammed on his brakes, which caused defendant to hit him. Defendant thought that Wilson had "staged [the] collision." Defendant stated that they were going approximately 10 miles per hour.

Defendant's passenger appeared to be drunk. Officer Vigil smelled a strong odor of alcohol emanating from defendant and saw that he had bloodshot, watery eyes. Defendant was also slightly swaying in a circular motion and had slurred speech. Defendant said he was coming from The Poet & The Patriot,[5] which was about a five- to seven-minute drive from the accident scene. He said he had consumed two beers. Defendant's driver's license indicated that defendant weighed 145 pounds.

Officer Vigil administered field sobriety tests, which defendant failed. Officer Vigil also collected two samples of defendant's blood alcohol content (BAC) using a preliminary alcohol screening device. The first sample registered a BAC of 0.147 percent; the second sample registered a BAC of 0.148 percent. Defendant was placed under arrest and transported to the hospital for his blood to be drawn.

In Officer Vigil's opinion, the primary cause of the accident was driving under the influence. If you "take DUI out of the equation," the primary factor was following too closely or traveling at an unsafe speed. There were no skid marks at the scene.

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[4] Officer Vigil explained that lanes are numbered in order from left to right, so the number 1 lane is the lane closet to the left, the number 2 lane is the lane immediately to the right of the number 1 lane, and so on.

[5] None of the witnesses explained what kind of establishment The Poet & The Patriot was, although defendant testified that on the afternoon of May 22, 2010, he was playing the piano at a music benefit there.

4. Expert Testimony

Forensic scientist John Lutz testified that defendant's blood sample had a BAC of 0.18 percent. Assuming a standard dosage of ethanol in each drink, a person weighing 145 pounds would have to consume six or seven drinks to have a BAC of 0.14 percent. It would take eight or nine standard drinks for a 145-pound person to reach a 0.18 percent BAC.

Mental impairment from alcohol begins at 0.01 to 0.05 percent BAC. Reaction times become slower and inhibitions are lowered. Multitasking is also impaired, and driving is a divided-attention task. In Lutz's opinion, most people are unsafe to drive once they reach a 0.05 or 0.06 percent BAC. All people are unsafe to drive with a 0.08 percent BAC. Muscle impairment, including impaired vision, begins at approximately 0.05 percent to 0.10 percent BAC. Slurred speech is indicative of muscle impairment. A collision is a possible indicator of alcohol impairment.

B. *Defense Evidence*

Defendant testified that on the afternoon of May 22, 2010, he was playing the piano with his jazz quartet at a music benefit at The Poet & The Patriot. While there, defendant drank two pints of beer. He left with his girlfriend around 7:00 or 7:30 p.m. He stopped at a liquor store to get a 12-pack of beer to take home. He put the beer behind the driver's seat and did not open it.

Defendant stated that after leaving the liquor store, he proceeded eastbound on Soquel Avenue, intending to turn left onto Morrissey Boulevard. He was traveling at approximately 25 or 30 miles per hour and decelerating because the left-hand turn light was red. Defendant then noticed two men on the sidewalk. One of the men was astride a bicycle; the other was standing next to the bike. Wilson was the person astride the bicycle.

Defendant testified that as he approached the intersection, Wilson got onto his bike "with the intention of getting in the [n]umber 2 lane to make a left turn onto

Morrissey." Defendant gave Wilson "a little beep, beep" to let Wilson know he was coming into the lane. Wilson, who was in the number 1 lane, passed defendant, who was in the number 2 lane and still decelerating, traveling at approximately 15 miles per hour. Wilson leered into defendant's window as he passed, which made defendant angry because he thought it was reckless. Defendant blared his horn and began yelling.

Defendant stopped the car in the number 2 lane and saw Wilson on the curb in front of the car. "Wilson was on the left-hand side, abreast of the front bumper of the car, because the bicycle was abreast to the right bumper of the car . . . ." Defendant does not remember any sort of contact between his car and Wilson's bicycle, although he told Officer Vigil that there might have been "a clipping. . . . ['C]ause, clearly, I was driving a car, and the bicyclist in front of me was no longer on his bike. He was to the front left, and his bike was to the right. At that . . . point, yes, there could have been a collision." Defendant did not hear or feel a collision though. There was no damage to the front of his car.

Defendant got out of the car. Four or five people wearing what looked like "county-issued jail rags" exited a Burger King yelling, " 'You're going to jail, man.' " Wilson was sitting on the sidewalk and was already on his phone. Defendant moved his car into the number 1 lane and left it there. Wilson's bicycle was in the street, possibly blocking traffic. Defendant picked up the bike and moved it onto the sidewalk, adjacent to the front of the car. Defendant then went over to Wilson and asked him, " 'What the hell is going on?' " Wilson responded, " 'You're going to jail, nigger. Hey, you motherfucker,' " and kicked defendant in the stomach. Defendant never touched Wilson. The police arrived and defendant spoke to Officer Vigil.

On cross-examination, defendant stated that it was his testimony that he did not strike Wilson and that there was no physical evidence connecting him to a collision. He also testified that Wilson "passed [him] on the left, overtook [his] vehicle, and entered

unsafely into [his] lane, in front of a stopping vehicle," and then fell. Defendant stated that Wilson put himself in harm's way.

C. *Charges, Verdicts, and Sentence*

Defendant was charged with driving a vehicle under the influence of alcohol causing injury (§ 23153, subd. (a); count 1) and driving a vehicle with a blood alcohol content of 0.08 percent or more causing injury (§ 23153, subd. (b); count 2). It was also alleged that defendant personally inflicted great bodily injury during the commission of the offenses (Pen. Code, § 12022.7, subd. (a)) and that defendant had previously been convicted of reckless driving involving the consumption of alcohol (§§ 23103, 23103.5, 23540, 23546).

A jury convicted defendant of the charged offenses but found the great bodily injury allegation not true. On its own motion and over the prosecution's objection, the trial court dismissed the prior conviction allegation in the interest of justice pursuant to Penal Code section 1385. The trial court placed defendant on probation for five years and ordered him to serve 270 days in county jail, complete 250 hours of community service, and pay various fines and fees.

III. DISCUSSION

Defendant contends that his convictions of driving a vehicle under the influence of alcohol causing injury and driving a vehicle with a blood alcohol content of 0.08 percent or more causing injury must be reversed because it is unclear whether the jury's verdicts rested on a legally incorrect theory of guilt. Among other elements, both of the charged offenses required the prosecution to prove that while driving under the influence, defendant either did an act forbidden by law or neglected a duty imposed by law. (Former § 23153, subds. (a), (b), added by Stats. 1992, ch. 974, § 18.) Defendant asserts that there is insufficient evidence to support the prosecution's theory of guilt that he did an act forbidden by law—namely, following too closely in violation of section 21703—and because it cannot be determined whether the jury's verdicts rested on this theory or

on a negligence theory, his convictions must be reversed. The Attorney General counters that defendant's argument mistakes evidentiary insufficiency for legal insufficiency and that in any event, the challenged theory is sufficiently supported by the evidence.

A. *Trial Court Proceedings*

As relevant here, the trial court instructed the jury that in order to prove both of the charged offenses, the prosecution had to prove that defendant "committed an illegal act or neglected to perform a legal duty . . . ." The court stated that the prosecution has "alleged that the defendant committed the following illegal act: following too closely" and that the prosecution has "also alleged the defendant failed to perform the following legal duty while driving the vehicle: the duty to exercise ordinary care at all times to maintain proper control of the vehicle." In addition, the court told the jury, "You may not find the defendant guilty unless all of you agree that the [prosecution has] proved that the defendant committed one illegal act or failed to perform one duty. You must all agree on which act the defendant committed or duty the defendant failed to perform." The trial court provided the jury with a written instruction on following too closely in violation of section 21703. The instruction stated, "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and condition of, the roadway."

Regarding count 1, the prosecutor told the jury during closing argument that he had to prove that "[w]hile driving under the influence, [defendant] performed an illegal act or neglected to perform a duty. [¶] In this instance, we talked a little bit about following too closely, and we'll talk more, but that's what that element represents." Regarding count 2, the prosecutor stated that the element he had to prove was "similar but different: [defendant] has to be a .08 at the time he performed that illegal act or duty. [¶] But roughly they're the same."

Later, the prosecutor argued, "It's our contention that [defendant] violated California Vehicle Code section 21703: Do not follow another vehicle more closely than

is reasonable and prudent, having due regard for the speed of such vehicle and traffic upon and the condition of the roadway. [¶] Basically, don't follow too closely. If you hit someone from behind, you're probably too close. [¶] . . . [¶] He was following him too closely. He violated that duty. He committed an illegal act when he hit Michael Wilson with his car."

The prosecutor also argued that defendant hit Wilson intentionally. The prosecutor asserted, "I think the evidence supports the conclusion that the defendant hit Michael Wilson intentionally. He did this on purpose. He saw his shot and he took it. He drove his car straight into Michael Wilson because he was mad and he had lowered inhibitions because he had had enough to drink that day to think, this isn't the worst idea in the world."

The verdicts did not specify whether the jury found that defendant had committed an illegal act or neglected to perform a legal duty when it convicted him of both offenses.

B. *Standard of Review*

" ' "To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." ' [Citations.] ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' [Citations.] The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104 (*Valdez*).)

C. *Analysis*

"The elements of the felony offense described by section 23153, subdivision (a) are '(1) driving a vehicle while under the influence of an alcoholic beverage or drug;

(2) when so driving, committing some act which violates the law or is a failure to perform some duty required by law; and (3) as a proximate result of such violation of law or failure to perform a duty, another person was injured. [Citation.] Section 23153, subdivision (b), has the same elements except the first element is expressed as driving a vehicle "while having 0.08 percent or more, by weight, of alcohol in his or her blood . . . ." [Citation.] To satisfy the second element, the evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence.' [Citation.] The unlawful act or omission 'need not relate to any specific section of the Vehicle Code, but instead may be satisfied by the defendant's ordinary negligence. [Citations.]' [Citation.]"[6] (*People v. Weems* (1997) 54 Cal.App.4th 854, 858, fn. omitted.) The second element "is separate from and is not satisfied by evidence that the defendant was under the influence of alcohol while operating the vehicle." (*People v. Oyaas* (1985) 173 Cal.App.3d 663, 667.)

Defendant contends that his convictions must be reversed because there is insufficient evidence to support the prosecution's theory that he committed the illegal act of following too closely and it cannot be determined whether the jury's verdict rested on this theory or on the theory that he neglected a duty imposed by law.

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[6] At the time of the offenses in May 2010, section 23153, subdivision (a) provided, "It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle *and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle,* which act or neglect proximately causes bodily injury to any person other than the driver." (Former § 23153, subd. (a), added by Stats. 1992, ch. 974, § 18, italics added.)

Subdivision (b) of that section provided, "It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle *and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle,* which act or neglect proximately causes bodily injury to any person other than the driver." (Former § 23153, subd. (b), added by Stats. 1992, ch. 974, § 18, italics added.)

Section 21703 states, "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway." Based on the record before us, we conclude there is sufficient evidence that defendant was following Wilson too closely in violation of section 21703.

Wilson testified that he was hit from behind and his bicycle's back wheel was bent from the impact. He also stated that there was a significant amount of traffic on the date of the accident. Craig testified that she heard honking and saw a vehicle and a bicycle to her left. The car and the bike were "maybe less than a car width" apart. According to Craig, "[t]hey were pretty close." She saw the bicycle in front of the car and then she saw the car strike the bike. Gonzales stated that he heard a long honk and saw a vehicle with a cyclist in front of it, before the cyclist disappeared. In addition, Officer Vigil testified that the intersection where the accident occurred "is a bit challenging to navigate, to say the least," so much so that his focus in approaching the scene was not getting into an accident himself. Officer Vigil stated that defendant told him that he was driving behind a cyclist who suddenly slammed on his brakes, which caused defendant to hit him. In Officer Vigil's opinion, once defendant's intoxication was taken "out of the equation," the primary reason why the collision occurred was that defendant was following too closely or driving at an unsafe speed. Finally, although defendant testified that he did not strike Wilson, he admitted that he told Officer Vigil that there might have been "a clipping. . . . ['C]ause, clearly, I was driving a car, and the bicyclist in front of me was no longer on his bike. . . . At that . . . point, . . . there could have been a collision." From this evidence, a rational jury could determine that defendant "follow[ed] [Wilson] more closely than [was] reasonable and prudent, having due regard for the speed of [Wilson's bicycle] and the traffic upon, and the condition of, the roadway," in violation of section 21703. (§ 21703; see *Valdez, supra*, 32 Cal.4th at p. 104.)

Defendant asserts that "Craig was the *only* witness who provided an estimate of how close [his] car was to Wilson's bicycle," and asks this court to dismiss her testimony as "inherently improbable." Defendant points out that Craig testified that she was driving approximately 25 to 30 miles per hour and noted on an aerial photograph of the intersection that she was across a traffic median with shrubbery when she saw the bike in front of the car. Defendant also observes that Wilson testified that when he looked behind him after he heard honking, the car closest to him was approximately 25 to 30 feet away.

"The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) Based on our careful review of the record, including the aerial photograph of the intersection, we conclude that Craig's testimony was neither physically impossible nor inherently improbable. It was partially corroborated by other witnesses, and there was circumstantial evidence to support Craig's testimony that defendant was following the cyclist closely and struck him—namely, the damage to the back wheel of Wilson's bicycle. In addition, defendant testified that he told Officer Vigil that he was driving behind a cyclist and there may have been a "clipping" or "collision." Although "[d]efendant points to evidence tending to undermine [Craig's] credibility, . . . this affects only the weight which the jury will give her testimony." (*Id.* at pp. 296-297.) It is not a basis to overturn the conviction. (See *id.* at p. 297.)

For these reasons, we conclude there is sufficient evidence in the record to support the prosecution's theory that defendant committed the unlawful act of following too closely while he was driving under the influence of alcohol. Thus, defendant's claim that

his convictions must be overturned because the jury may have rested its verdicts on a legally insufficient theory fails.[7]

IV. DISPOSITION

The judgment is affirmed.

[7] Because we conclude that the prosecution's theory that defendant followed too closely in violation of section 21703 is sufficiently supported by the evidence, we need not determine whether a lack of substantial evidence in support of the theory would have necessitated reversal, as defendant claims. We note, however, that when a charge is presented to the jury based on alternate theories of guilt, one of which is factually insufficient, reversal is not required so long as "a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; see also *Griffin v. United States* (1991) 502 U.S. 46, 49.) Defendant does not contend that there is an affirmative indication in the record that the verdicts actually rested on the allegedly inadequate ground.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P. J.

MIHARA, J.

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